SOON PENG YAM & ANOR

v.

BANK OF TOKYO-MITSUBISHI (MALAYSIA) BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-283-01]
25 AUGUST 2003

CONTRACT: *Guarantee - Demand for payment - Whether made - Certificate of indebtedness - Whether conclusive proof of debts*

The respondent bank obtained judgment against the appellants as guarantors of an overdraft facility defaulted by the principal borrower. Hence, the appellants' appeal.

The issues were: (1) whether the respondent had proved that a demand was made before it filed the relevant writ action; and (2) whether the certificate of indebtedness was conclusive proof of the debts against the appellants.

Held:
Per Alauddin Mohd Sheriff JCA

[1] The liability of a guarantor arises only on demand made. The service of a notice of demand is a prerequisite for the institution of any proceedings in respect of the claim. (p 535 g)

[2] The writ action was filed on 23 September 1988 whereas the letters of demand served on the appellants were dated 18 February 1989, ie, some five months after the writ action was filed. There was no demand made by the respondent against the appellants before the writ action was filed. As such, the respondent failed to prove that there was a demand made against the appellants before the filing of the writ action which gave rise to their liability under the guarantee. As the service of the letters of demand was a *sine qua non* for the foundation of legal liability under the guarantee, it followed that the respondent had not made out a case against the appellants. (pp 536 d & 537 b)

[3] It was obvious from the errors found on the face of the certificate of indebtedness that it was not conclusive proof of the debts against the appellants. Therefore, it was not binding upon the appellants as guarantors. (p 538 g)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden bank memperoleh penghakiman terhadap perayu-perayu sebagai penjamin kepada satu kemudahan overdraf yang gagal dibayar balik oleh peminjam. Perayu-perayu dengan itu telah merayu. Isu-isunya adalah: (1) sama ada responden telah membuktikan bahawa tuntutan telah dibuat sebelum ia memfailkan tindakan writnya; dan (2) sama ada sijil keberhutangan merupakan bukti konklusif tentang keterhutangan perayu-perayu.

Diputuskan:
Oleh Alauddin Mohd Sherriff HMR

[1] Liabiliti seseorang penjamin hanya berbangkit apabila tuntutan dibuat. Penyerahan satu notis tuntutan adalah prasyarat bagi pengemukaan prosiding berkaitan tuntutan.

[2] Tindakan writ difailkan pada 23 September 1988 manakala surat-surat tuntutan pula bertarikh 18 Februari 1989, iaitu lebih kurang lima bulan selepas tindakan writ difailkan. Tiada tuntutan dibuat oleh responden terhadap perayu-perayu sebelum tindakan writ difailkan. Responden dengan itu gagal membuktikan bahawa tuntutan telah dibuat terhadap perayu-perayu sebelum pemfailan tindakan writ yang membangkitkan liabiliti di pihak mereka di bawah jaminan. Oleh kerana penyerahan surat-surat tuntutan adalah s*ine qua non* kepada kewujudan liabiliti di bawah jaminan, ianya mengikut bahawa responden telah gagal membuktikan kesnya terhadap perayu-perayu.

[3] Dari kesilapan-kesilapan yang terdapat pada sijil keberhutangan, adalah jelas bahawa sijil tersebut tidak menjadi bukti konklusif tentang keterhutangan perayu-perayu. Sijil tersebut, dengan itu, tidak mengikat perayu-perayu sebagai penjamin.

Rayuan dibenarkan.]

Case(s) referred to:

Lum Sow Kuen v. Chuah Choong Heong & Ors [1998] 4 CLJ 162 ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 MLJ 610 ***(refd)***

Oriental Bank Bhd v. Jaafar Sidek Mohd Salam & Ors [1990] 2 CLJ 72; [1990] 2 CLJ 585 HC ***(refd)***

For the appellant - Y Thing; M/s Lee, Ling & Partners

For the respondent - Mabel N Jomes (Prema Joseph); M/s Hamzah, Sulaiman & Partners

[Appeal from High Court, Kuala Lumpur; No: D4(D9)-23-2442-88]

Reported by Usha Thiagarajah

JUDGMENT

Alauddin Mohd Sheriff JCA:

The appellants (2nd & 3rd defendants) are guarantors of an overdraft facility with a credit limit of RM300,000 granted by the respondent (plaintiff) to Sim Lim Co. (M) Sdn. Bhd. (4th defendant) pursuant to an overdraft agreement dated 3 April 1980 (exh. P1 at p. 202, Appeal Record). The respondent had *vide* a letter dated 28 March 1986 (exh. P2 at p. 203, Appeal Record) to the 4th defendant renewed the credit limit of the overdraft facility to RM150,000 and granted Letters of Credit and Bills of Receivables for a credit limit of RM200,000.

The appellants had on 18 April 1980 executed a joint and several guarantee (exh. P6 at p. 210, Appeal Record) which was limited to RM700,000 for all sums of money owing to the respondent on any account of the 4th defendant.

The 4th defendant defaulted in paying the outstanding amount under the facilities and as a result the respondent withdrew the said facilities *vide* a letter dated 27 April 1988. The liability of the appellants under the guarantee is predicated a demand being made by the respondent in accordance with cl. 15 of the guarantee.

Default in repayment having occurred, the respondent issued three letters of demand to the appellants. The first letter of demand is dated 16 July 1988 (exh. P15 & P16 at p. 35, Appeal Record). The second letter of demand is dated 17 August 1988 (exh. ID17 & ID19 at pp. 36 to 38 Appeal Record). The third letter of demand is dated 18 February 1989 (exh. ID21 & ID23 at pp. 36-38, Appeal Record).

The respondent heard nothing from the appellants. So, on 23 September 1988 the respondent issued a writ accompanied by a statement of claim against the borrower and the guarantors and on 18 December 1989 the respondent obtained judgment in default of defence against the borrower (4th defendant) for the sum of RM185,486.54 and on 27 February 2001, after a trial, judgment was entered against the appellants. Hence this appeal.

In this appeal before us, learned counsel for the appellants raised two issues as follows:

(i) Has the respondent proved that a demand was made pursuant to the letter of demand dated 18 February 1989 (ID21 & ID23) served by the respondent's solicitors on the appellants before the writ action in encl. 1 was filed?

(ii) If the demand is proven, is it valid and is it the amount in the demand letter certified in the certificate of indebtedness (exh. P10)? In other words, is the sum in the certificate of indebtedness correct and conclusive.

Before we proceed to consider the issues, it would be appropriate for us at this juncture to mention that there were at least two amendments made to the respondent's statement of claim. By the first amendment which took place on 12 August 1989 the respondent added Sim Lim Co. (M) Sdn. Bhd. (the borrower) as the 4th defendant. At the same time the respondent deleted a letter of demand dated 17 August 1988 (ID17 & ID19) against the appellants and separated two (2) letters sent by the respondent's solicitors as follows:

(i) Letter dated 17 August 1988 (ID17 & ID19) to the 1st defendant only;

(ii) Letter dated 18 February 1989 (ID21 & ID23) to the appellants only (see para 5 of reamended statement of claim at p. 59, Appeal Record).

By another amendment in 1994, the respondent reamended para. 4 of the statement of claim to delete the claims in respect of Trust Receipts.

On the first issue, it is settled law that the liability of a guarantor arises only on demand made. The service of a notice of demand is a prerequisite for the institution of any proceedings in respect of the claim. In *Mok Hin Wah & Ors v. United Malayan Banking Corp. Bhd.* [1987] 2 MLJ 610, the then Supreme Court when faced with the same question regarding a letter of demand had this to say (at p. 610):

> In our opinion, the law is very clear on this point. The respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors.

And further at p. 611:

> Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a condition precedent to suing the guarantor. (See also *Ng Hee Thoong & Anor v. Public Bank Bhd.* [1995] 1 CLJ 609 and *Allied Bank (Malaysia) Bhd. v. Yau Jiok Hua* [1998] 2 CLJ 33).

Based on these authorities we asked ourselves the question whether the respondent here has proved that the demand was made against the appellants.

The respondent's action is grounded upon the appellant's failure to comply with the guarantee based on the demand made in a letter dated 18 February 1989 only (ie, ID21 & ID23). Based on their pleadings there is no other demand made against the appellants.

From the pleadings, we would observe that the writ was filed on 23 September 1988 whereas the notice of demand (ID21 & ID23) was purportedly made on 18 February 1989 ie, five (5) months after the writ was filed. In other words, there was no demand made by the respondent against the appellants before the writ of summons was filed. This is confirmed by PW1's evidence under cross-examination which reads as follows (see p. 152 Appeal Record):

> (Refer enclosure 1) – It was filed on 23.9.1988. The writ was filed before letter of demand 'ID21' and ID23' were sent. There was a judgment entered against Fourth Defendant – but I don't know whether by consent or in default of appearance.

For reasons best known to her learned counsel for the respondent saw it fit not to reexamine PW1 regarding the service of the letters of demand (ID21 & ID23) on the appellants (see p. 152 Appeal Record). The second appellant (DW1) in his evidence also confirmed that he did not receive any letter of demand from the respondent before filing of this action. His evidence was never cross-examined (see p. 159 Appeal Record). Thus it must be accepted that the failure to cross-examine the defendants on important aspects of their evidence must be treated as acceptance of those parts of their evidence (See *Lum Sow Kuen v. Chuah Choong Heong & Ors* [1998] 4 CLJ Supp 161).

In the reamended para. 5 of their statement of claim the respondent had also stated that they sent a letter dated 17 August 1988 to the first defendant. We find that this letter is irrelevant to the facts in issue as it was sent to the first defendant.

The respondent had also admitted sending a letter dated 16 July 1988 (P15 and P16) to the 2nd defendant and the appellants. We also consider this letter as irrelevant for the reason that it was not pleaded in the statement of claim ie, the letter of demand dated 16 July 1988 is not in the pleadings.

Taking into account the facts and submissions made by counsel before us in this appeal, we find that the respondent has failed to prove that there was a demand made against the appellants before the filing of the writ which gives rise to their liability under the guarantee. The service of the notices of demand is a *sine qua non* for the foundation of legal liability under the guarantee (see *Ng Hee Thoong & Anor v. Public Bank Bhd (supra)*). As such we find that the respondent had not made out a case against the appellants.

In dealing with this issue, in his judgment, the learned judge had failed to recognize that ID21 & ID23 were letters of demand issued after the commencement of the action against the appellants. So in admitting them as relevant against the appellants the learned judge had clearly misdirected himself.

We shall now move on to the second issue which relates to exh. P10, the certificate of indebtedness dated 30 November 2000 (see p. 216, Appeal Record). In his evidence at p. 158, Appeal Record, DW1 (second appellant) in reply to questions from his counsel stated that P10 was never posted to him. He added that P10 was not correct and it was given to him twelve (12) years after the respondent had filed the action. Once again the respondent's counsel did not cross-examine him on this point.

It is also the appellants' contention that P10 is not conclusive proof of the debts against them. They claim that on the face of it P10 contains the following errors:

(a) the sum in the letter of demand (ID21 & ID23) is not stated in P10;

(b) the sum in para. 5 of the reamended statement of claim is also not stated and certified in P10;

(c) there is only one overdraft account operated by Sim Lim Co. (M) Sdn. Bhd, the principal borrower;

(d) the overdraft account No. 0032 appearing in exh. D25 is different from exh. P10, where the account no. is 100072. No explanation is rendered by the respondent for the difference in respect of these two accounts.

(e) The certificate P10 shows the amount due as at 30 November 2000 on two facilities as follows:

(i) Loan Amount: Account No. 100072 – interest at Suspense Account – RM240,516.87

(ii) Bills Outstanding:	RM37,556.38
Interest in Suspence Account as at 30 November 2000	RM90,597.23
(iii) Total sum	RM479,032.61

and interest rate is charged at 9% per annum.

It was never explained by the respondent how the sum of RM185,486.54 which forms the basis of the legal claim in para. 5 of the amended statement of claim can become RM479,032.61 in exh. P10 ie, four (4) times the amount.

(f) The amount of RM37,556.38 in P10 itemised under Bills outstanding – Bill No. 641 – BRS – 318438 (exh. P11 and Bill No. 641 – BRS – 318652 (exh. P13) as Trust Receipts is plainly wrong because Trust Receipts had been deleted in para. 5 of the reamended statement of claim ie, it does not form part of the facilities granted and guaranteed. The sum of RM37,556.38 as Trust Receipts is also proven in P7 (see p. 213 Appeal Record).

(g) In exh. P7 the respondent had specifically explained that this sum of RM37,556.38 is for the two (2) Trust Receipt Bills. It is not for Bills of Exchange or Bills Receivables. In other words this sum of RM37,556.38 in P10 under Bills Outstanding is only for Trust Receipt ie, TR. Resulting from this TR – RM37,556.38, the respondent added another sum of RM90,597.23 as interest making it a total sum of RM128,153.61 on Bills Outstanding. This is definitely wrong as it goes against the respondent's own pleadings (see para 4 of the amended statement of claim).

(h) However, in para. 4 of the amended statement of claim, the respondent had deleted Trust Receipts and pleaded instead the sum of RM37,556.38 for Letters of Credit and Bills Receivable.

From the above it is too obvious to us that exh. P10 ie, certificate of indebtedness, cannot be conclusive proof of the debts against the appellants. It is invalid, null and void and cannot therefore be binding upon the appellants as guarantors.

In *Oriental Bank Bhd. v. Jaafar Sidek bin Mohd. Salam & Ors* [1990] 2 CLJ 72; [1990] 2 CLJ (Rep) 585, it was decided by Siti Normah Yaakob J (as she then was) that a guarantor was not bound by a certificate issued under a conclusive evidence clause if he was able to show that there was a manifest error on the face of the certificate.

Under these circumstances, we find that the judge had again misdirected himself when he decided that P10 was conclusive proof of debts against the appellants.

For the reasons we have already stated above, we are unanimous that this appeal should be allowed with costs.

My learned brother Mokhtar bin Haji Sidin JCA has seen this judgment and expressed his agreement with it. My learned brother Mohd. Saari bin Yusoff has since retired.